

THOMPSON COBURN

Thompson Coburn LLP

Memorandum

To: American Business Media Members

From: David Straus

Date: March 15, 2004

Re: Advance Notice of Proposed Rulemaking on definitions, implementation, and reporting requirements of the CAN-SPAM Act

On April 11th, the Federal Trade Commission (“FTC”), the agency responsible for administering the CAN-SPAM Act, called for comment on areas to be covered by rules implementing various provisions of the Act. Comments on the do-not-email registry are due March 31st. Comments on the other issues are due April 12th.

The following is a summary of the issues upon which the FTC has called for comment and what we expect will be American Business Media’s position.

Definition of Commercial E-Mail

Most prohibitions and requirements contained in the CAN-SPAM Act apply to e-mail where the “primary purpose” is commercial. The FTC has asked how it should define and apply the “primary purpose” test. The FTC is seeking comment upon the following criteria:

- Whether the commercial purpose is more important than all the other purposes of the e-mail, or only one other purpose of the e-mail.
- A “net impression” standard that takes into account the meaning of an e-mail and the disclosures made in the e-mail, depending upon factors such as the placement and prominence of disclosures.
- Whether an e-mail’s commercial aspects are “more than incidental” to the e-mail.
- Whether the commercial aspects of an e-mail financially support the e-mail’s other aspects (such as a newsletter that is supported with advertisements).
- Whether the identity of the sender should be a factor in determining whether the primary purpose of an e-mail is commercial (for example, a for-profit business sending e-mails to advertise a charity project the business is involved in).

American Business Media will argue for exclusion of e-mails with significant editorial content. We will also argue for exclusion of e-mails from non-profit associations that incorporate commercial messages related to the primary purpose of the association, such as meetings, publications and seminars.

Transactional and Relationship Messages

“Transactional” and “relationship” messages¹ are excluded from the definition of commercial e-mail. As a result, most provisions of the Act do not apply to these types of messages. The FTC has asked for comment upon the following issues:

- Whether the Act’s definitions of transactional and relationship messages should be changed because of technological developments.
- Whether any of the five categories of transactional or relationship messages should be modified or clarified to avoid evasion, or to provide more effective enforcement, of the Act.
- How should the FTC ascertain the primary purpose of an e-mail message that consists of transactional or relationship content and advertising material?

American Business Media intends to seek clarification. We will also ask the FTC to clarify that members of associations are entitled, under the fifth definition (see footnote), to receive information related to association products or services.

Opt-out Processing Period

If the recipient of a commercial e-mail message opts out of further commercial e-mail, senders have ten business days to process the recipient’s opt-out request. The FTC is seeking comments about whether ten days is a reasonable time to process opt-outs.

Your comments are specifically requested here.

Aggravated Violations

The CAN-SPAM Act provides for increased damages for aggravated violations such as address harvesting or dictionary attacks. The FTC is interested in learning what new technologies contribute to these aggravated violations, and whether additional actions should be also be included as aggravated violations.

Absent membership input, we do not expect to comment on this issue.

The Act’s Definition of “Sender”

¹ As we have previously reported, these include messages that (1) complete or confirm a transaction, (2) provide warranty, recall or safety information, (3) provide certain information related to the recipient’s account, subscription, or membership, (4) provide information related to an employment relationship or benefit plan, or (5) that “deliver goods or services,” including product updates or upgrades that are part of a prior transaction.

More than one person can be a “sender” for purposes of the Act. The FTC has asked for comments on the following issues related to the Act’s definition of “sender”:

- Who is the “sender” of an e-mail if there appear to be multiple senders?
- If a recipient has previously opted out of commercial e-mail from one company advertised in an e-mail containing multiple advertisements, has the Act been violated? By whom?
- Should the FTC clarify this issue?

Clarification is appropriate, and your input is requested.

Valid Physical Postal Address

How should the FTC interpret the phrase “valid physical postal address” of the sender?

The main question here is whether a post office box meets the definition of a “physical” address. To make the Act more effective against spammers, it would seem that the answer should be “no,” but do any of you have a contrary view?

“Forward-to-a-Friend” Campaigns

The Act defines “initiate” as originating, transmitting, or procuring the origination or transmission of a message. “Procure” is defined as paying or inducing another person to initiate a message.

- Should “forward-to-a-friend” and similar marketing campaigns that encourage customers to forward commercial e-mails to someone else fall within the Act?
- What are the different forms of e-mail marketing campaigns, and should they have to comply with the Act?
- Should web sites that encourage visitors to forward e-mails to other people fall within the scope of the Act?

Any comments?

National Do-Not-E-mail Registry

The FTC is interested in receiving comments assessing the practicality, feasibility, and enforceability of a national Do-Not-E-mail registry. The FTC is specifically seeking comments on how such a registry might function, its costs and benefits, and whether it would effectively reduce spam.

Here, we expect to argue strongly that technology and the present law should be given a chance. Given the pervasiveness of spam, it should be expected that many people who do not mind receiving the types of

e-mails sent by American Business Media members may nevertheless place their names on a registry. The result will terminate legitimate e-mail advertising while doing nothing to discourage the spammers, who are violating the law today.

Labeling Requirements

The FTC is also seeking comments evaluating the feasibility, costs, and benefits of including a label, such as the signifier “ADV,” in the subject line of commercial e-mail. The FTC would like comments about the implementation of labeling requirements, the costs and benefits of labeling for consumers and senders of commercial e-mail, and whether labeling would effectively reduce spam.

Our general view is that this is a terrible idea, since, like a do-not-email registry, it will hurt only the legitimate e-mailers.